

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	GN Docket No. 12-228
Advanced Telecommunications Capability to)	
All Americans in a Reasonable and Timely)	
Fashion, and Possible Steps To Accelerate)	
Such Deployment Pursuant to Section 706 of)	
the Telecommunications Act of 1996, as)	
Amended by the Broadband Data)	
Improvement Act)	

**COMMENTS OF
THE ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES and
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

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September 20, 2012

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SUMMARY

The Commission has erected, rather than removed, barriers to further broadband investment and deployment by rural local exchange carriers (RLECs) through its changes to universal service and intercarrier compensation (ICC) rules. RLECs' ability to make reasonable investment decisions and to obtain financing have been severely impeded due to untested and unpredictable regression analysis-based limits on support that prevent RLECs from identifying the level of expenditure cuts they must make to avoid exceeding funding caps in future years. Furthermore, support that RLECs expected to receive under the rules when investments were made in prior years has been retroactively curtailed. ICC is being phased down without any concomitant finding as to how this might possibly advance rural broadband investment. While RLECs will bear the burden of reduced access rates and a mechanism that will prevent the full recovery of these costs, there is no requirement on carriers that benefit from these changes to direct the savings toward further investment in rural networks. Moreover, the mechanism intended to replace ICC has been shoehorned into a pre-existing level of RLEC funding, thereby preventing RLECs from sufficiently recovering the loss in operating revenue they need to maintain affordable services and meet the Commission's goals for the promotion of advanced services and a migration to IP-enabled networks. In short, the Commission has not explained or even attempted to tackle the question of how RLECs are expected to maintain current networks and affordable rates, much less expand broadband availability, while the cost recovery mechanisms they rely upon are subject to cuts and caps that are at odds with the Commission's mandate to establish universal service mechanisms that are sufficient and predictable. These barriers to investment should be removed.

The Commission should also immediately expand the base of contributors to the universal service fund (USF) to include, among others, all broadband Internet access services. It is increasingly problematic to rely exclusively on a dwindling contribution base of interstate and international voice-grade service revenues, and it is utterly paradoxical to reconfigure the “distribution” side of USF to support broadband while excusing broadband from the “contribution” side of the ledger. Assessing broadband Internet access and other services would establish an expanding contribution base that could provide the necessary resources to ensure the ongoing availability of affordable, robust broadband services to all Americans in a reasonable and timely fashion.

Support for broadband deployment should not be targeted based on data used to produce the National Broadband Map. This data is recognized to be unreliable and prone to errors. Until these flaws are corrected, the National Broadband Map should not be used for funding decisions.

Finally, the Commission should take immediate action to reform its rules regarding access to video programming, notably those involving retransmission consent, so that RLECs can gain access to video content at affordable rates and on reasonable terms and conditions. The bundling of video services with broadband increases the relevancy of broadband for many consumers, resulting in significant increases in broadband adoption. Therefore, program access reform is a key step to the acceleration of broadband adoption, which in turn spurs further broadband deployment.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)¹ and the National Telecommunications Cooperative Association (NTCA)² (collectively, the Associations) hereby submit these comments in the above-captioned proceeding.³ The NOI solicits comment regarding the deployment of advanced telecommunications to all Americans in a reasonable and timely

¹ OPASTCO is a national trade association representing approximately 420 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve approximately 3 million customers.

² NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 12-228, Ninth Broadband Progress Notice of Inquiry, FCC 12-91 (rel. Aug. 21, 2012) (NOI). OPASTCO & NTCA comments

fashion, and seeks recommendations on possible steps that could accelerate broadband deployment.

The NOI observes that many consumers are able to enjoy much higher broadband speeds that have become available relatively recently.⁴ RLECs have done their utmost to provide comparable levels of service to their consumers, and have achieved this where feasible. However, due to the high costs of serving sparsely populated areas, most RLECs still need to make substantial further investments and upgrades to reach the comparatively modest 4 Mbps download/1 Mbps upload broadband speed availability targeted for ubiquity by the Commission.⁵

Ironically, the Commission has erected, rather than removed, barriers to further broadband investment and deployment in these areas through its universal service and ICC reforms, which subject RLEC cost recovery mechanisms to additional cuts and caps. The lack of predictability and sufficiency of support provided under these new rules severely impede RLECs' ability to maintain and expand broadband availability and service quality. In addition, the Commission has not paired new obligations with a corresponding broadband-specific funding mechanism.

⁴ The NOI notes that Verizon is offering up to 300 Mbps/65 Mbps for FiOS, while CenturyLink is offering up to 40 Mbps/5 Mbps. Also, DOCSIS 3.0, which is capable of 100 Mbps speeds and higher, has been deployed to 82 percent of U.S. households. NOI, ¶2. Notably echoing the "100 Mbps to 100 million homes" rhetoric from 2009, Chairman Genachowski wrote just in the past week: "On wired broadband infrastructure, we've made major progress too. At the beginning of 2009, broadband networks capable of 100 megabits per second passed less than 20% of U.S. homes. That number is now over 80%, putting the U.S. – for the moment – near the top of the world in deployment of high-speed broadband infrastructure." See, <http://techcrunch.com/2012/09/16/the-need-for-speed/>.

⁵ NOI, ¶3. Unfortunately, a 4/1 Mbps standard for supported networks means that we are starting once again at a USF regime that by empirical measure does not provide for "reasonable comparability" between rural and urban areas.

Furthermore, the Commission should immediately expand the base of contributors to the USF to include all broadband Internet access services, among others. Also, it should not base funding decisions on unreliable data used to produce the National Broadband Map. Finally, the Commission should remove barriers to RLECs' access to video content, as offering video and broadband together enhances adoption by consumers which spurs additional investment and deployment.

II. THE REFORMS ADOPTED IN THE *USF/ICC TRANSFORMATION ORDER* FAIL TO ENSURE THAT BROADBAND WILL CONTINUE TO BE DEPLOYED TO CONSUMERS IN RLEC SERVICE AREAS IN A REASONABLE AND TIMELY FASHION

As part of fulfilling its statutory duty to assess whether broadband Internet access services are being deployed to all Americans in a reasonable and timely fashion, the Commission points to the *USF/ICC Transformation Order*,⁶ and asserts that the reforms contained therein will enable the Commission to meet the Section 706 mandate.⁷ However, in areas served by RLECs, ongoing predictable and sufficient support is necessary to ensure that rural consumers gain and retain access to affordable broadband service that is reasonably comparable to that offered in urban areas and that meets the performance metrics set forth in the *Order*.⁸ Unfortunately, the *USF/ICC Transformation Order* has erected barriers to making this a reality by injecting insufficiency and substantial uncertainty into the High-Cost program for RLECs. The migration to IP-

⁶ *Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*” or “*Order*”).

⁷ NOI, ¶45.

⁸ *See*, National Exchange Carriers Association (NECA), NTCA, OPASTCO, and Western Telecommunications Alliance (WTA) reply comments, WC Docket No. 10-90, *et al.* (filed May 23, 2011), p. 47 (“most RLECs still need to make substantial further investments and upgrades to reach the 4 Mbps download/1 Mbps upload broadband availability target advocated in the NBP and NPRM, much less to offer the significantly greater bandwidths and speeds that are already being demanded today by customers to accommodate the ever-growing number of bandwidth-intensive applications and services.”). OPASTCO & NTCA comments

enabled networks, as well as the availability, service quality, and adoption of broadband, will all suffer in RLEC areas if caps artificially limit the support needed to operate in such areas, if providers do not have the ability and incentive to maintain high quality networks, or if they need to charge consumers substantially increased rates to do so.

To begin with, as more than 650 RLECs recently made clear,⁹ the regression analysis-based limits on high-cost loop support (HCLS) that were adopted in the *USF/ICC Transformation Order*¹⁰ have created a significant level of uncertainty that threatens to severely hamper RLECs' ability and incentive to improve the quality and availability of their broadband services. This is because RLECs cannot determine, with any reasonable degree of accuracy, the extent to which their capital expenditures and/or operating expenses must be reduced to avoid exceeding the caps in future years.¹¹ In any case, it is unlikely that RLECs will have access to the financing necessary to make network investments, as lenders are also influenced by the significant uncertainty that the Commission has injected into the RLEC High Cost program. Moreover, the retroactive applicability of the untested and unpredictable regression analysis-based caps has put at

⁹ *Ex parte* letter of 656 Concerned Rural Carriers to Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel and Pai, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208 (filed July 12, 2012).

¹⁰ USF/ICC Transformation Order, 26 FCC Rcd 17741-17747, ¶¶ 210-226. *See also*, *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337, Order, 27 FCC Rcd 4235 (2012).

¹¹ *See*, Application for Review of OPASTCO, NTCA, NECA, and WTA, WC Docket Nos. 10-90 and 05-337 (filed May 25, 2012) (AFR), p. 16 (noting, among other things, that "carriers cannot discern precisely why they have been captured by the caps, or what they should do to alter investment or operating practices to become allegedly 'more efficient.'"). *See also*, AFR, p. 15 ("Of perhaps even great concern, the fact that the caps will change each year due to factors beyond any individual carrier's control further undermines any effort to encourage efficiency and prudence."); AFR, p. 13 (stating that "capped carriers do not have clear 'peers' to look to in determining how their operations might become 'more efficient' or 'more prudent'"). In addition, as the Rural Associations have pointed out, the quantile regression formulas are riddled with numerous, material technical errors that severely undermine any assertion that they can effectively predict "sufficient" levels of HCLS for RLECs. AFR, pp. 4-13.

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risk some RLECs' ability to repay loans for existing infrastructure. This threatens the affordability and availability of *existing* broadband services in RLEC service areas, let alone further deployments.

Additional cuts and caps to RLECs' cost recovery mechanisms adopted in the *USF/ICC Transformation Order* further limit these carriers' ability to meet the directive contained in Section 706. These include the elimination of Safety Net Additive (SNA) support, even in cases where a carrier's eligibility for such support was based on investments made in 2010 or 2011. This retroactive applicability of the SNA elimination denies these carriers of support they qualified for and reasonably expected to receive under the rules as they existed at the time the investments were made.¹² Moreover, while the *Order* adopted an access recovery mechanism intended to enable RLECs to recover revenues lost as a result of mandated access rate reductions, this mechanism fails to provide these carriers with adequate cost recovery, further hampering their ability to maintain and upgrade advanced networks. There has been no concomitant finding regarding how access rate reductions, along with a mechanism that allows for only a partial recovery of these losses, will promote broadband investment in rural service areas. While RLECs will bear the burden of reduced access rates and a mechanism that will prevent the full recovery of these costs, there is no requirement on carriers that benefit from these changes to direct the savings toward further investment in rural networks.

¹² See, *USF/ICC Transformation Order*, 26 FCC Rcd 17758, ¶252, fn. 409 ("We recognize that some carriers denied support under this rule may have made investments in 2010 and 2011 expecting to receive SNA in 2012 or 2013 for those expenditures"). See also, Petition for Reconsideration and Clarification of OPASTCO, NECA, and WTA (filed Dec. 29, 2011) (PFR), p. 15 (stating that the Commission's purported justification for the retroactive elimination of SNA, "assumes the industry should have expected the Commission to engage in retroactive rulemaking.").

To make matters worse, the Further Notice of Proposed Rulemaking (FNPRM) adopted along with the *Order* threatens even greater reductions in RLECs' cost recovery mechanisms. In particular, the FNPRM suggested reviewing whether to represcribe the authorized interstate rate-of-return.¹³ It also sought comment on a process to reduce high-cost support for rate-of-return carriers in study areas where one or more unsubsidized competitors offers voice and broadband service to less than 100 percent of the customers.¹⁴ In addition, there was a proposal to extend the still-nascent and untested regression analysis-based caps to Interstate Common Line Support (ICLS).¹⁵ Finally, in regard to further ICC reform, proposals to reduce additional ICC rate elements to bill-and-keep and subject RLECs' Access Recovery Charges (ARCs) and/or the Connect America Fund (CAF) ICC mechanism to defined or accelerated phase-outs were included.¹⁶ These additional potential reductions in critical revenue streams only heighten RLECs' uncertainty regarding their ability to recover costs and, if enacted, will only widen the "broadband availability gap" that the Commission claims to have narrowed.¹⁷

In the face of cuts and caps imposed on existing high-cost support and ICC mechanisms, and with the threat of additional cuts to come, the *USF/ICC Transformation Order* also adopted stringent public interest obligations for RLECs, including the requirement to make available 4 Mbps download/1 Mbps upload speeds upon reasonable

¹³ FNPRM, 26 FCC Rcd 18055, ¶1057.

¹⁴ *Id.*, 26 FCC Rcd 18058, ¶1073.

¹⁵ *Id.*, 26 FCC Rcd 18061, ¶1085.

¹⁶ *Id.*, 26 FCC Rcd 18109-18115, 18120-18121, ¶¶1297-1314, 1326-1329.

¹⁷ NOI, ¶45.

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request.¹⁸ Making matters worse, these obligations were not paired with an RLEC-specific CAF mechanism or any material, predictable, or sustainable incremental funding sources. *Nearly a year* after the adoption of the *USF/ICC Transformation Order*, the Commission has yet to establish this critical mechanism, despite the fact that the Rural Associations proposed a sensible, surgical, and well-defined approach to deploy and maintain increasing levels of broadband within a reasonable budget (*i.e.*, the “RLEC Plan”).¹⁹ It would seem that if the Commission is truly committed to ensuring that broadband “is being deployed to *all* Americans in a reasonably and timely fashion,”²⁰ an RLEC-specific CAF mechanism designed to enable these carriers to meet its goals for broadband availability and quality would be a top priority.

Moreover, the *USF/ICC Transformation Order*’s public interest obligations are expected to be met within a total high-cost support budget of approximately \$2 billion for rate-of-return carriers.²¹ While it is true this budget is approximately the same as the funding level for these carriers prior to the *Order*’s adoption, that funding must now also accommodate the CAF ICC mechanism that partially recovers lost ICC revenues. This means that RLECs are now expected to meet greater public interest obligations with less revenue.

¹⁸ *USF/ICC Transformation Order*, 26 FCC Rcd 17740-17741, ¶206.

¹⁹ Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et. al.* (filed Apr. 18, 2011); Letter from Walter B. McCormick, Jr., United States Telecom Association, *et. al.*, to Chairman Genachowski, FCC, WC Docket No. 10-90, *et al.*, (Consensus Framework). If the Commission does not adopt the RLEC Plan, at a minimum discrete elements must be adopted to promote access to reasonably comparable broadband services in high-cost areas served by RLECs. These include a mechanism for supporting standalone broadband offerings (*ex.*, “naked DSL”), support for middle mile costs, and an IP-enabled switching additive.

²⁰ 47 USC §1302(b) (emphasis added).

²¹ *USF/ICC Transformation Order*, 26 FCC Rcd 17711-17712, 17738, ¶¶126, 195.

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The Associations recognize that the High-Cost USF program is not an unlimited resource, and appreciate and share desire to minimize the universal service contribution burden on consumers and businesses. However, meeting the *Order's* public interest obligations, along with the mandates of Sections 254 of the Communications Act of 1934, as amended, and 706 of the Telecommunications Act of 1996, as amended, will require a “sufficient and predictable” CAF mechanism for RLECs that does not place budgetary constraints as its top consideration. In that regard, the Commission should consider that if existing high-cost support levels for RLECs were sufficient to enable the provision of affordable and reasonably comparable services to all rural consumers in a reasonable and timely fashion, these carriers would already be doing so. The fact is, while RLECs have made great strides in making broadband available throughout their service areas, significant additional investments and upgrades must be made to achieve the Commission’s goals and the mandates of the Act, and ongoing sufficient and predictable support is necessary to enable such investments and upgrades.

In short, the *USF/ICC Transformation Order* is more likely to hinder than promote the deployment of advanced services to *all* Americans in a reasonable and timely fashion. The lack of predictability and sufficiency of cost recovery for the deployment and operation of broadband-capable networks not only limits RLECs’ ability to provide higher quality services to additional consumers, it may even threaten the quality and affordability of services available today. The Commission should therefore remove the “barrier of uncertainty” that it has created and provide RLECs with the sufficient and predictable support necessary to meet the challenge of Section 706.

III. TO ENSURE THE SUSTAINABILITY OF UNIVERSAL SERVICE FUNDING THAT IS NECESSARY TO PROVIDE BROADBAND TO ALL AMERICANS IN A REASONABLE AND TIMELY FASHION, THE COMMISSION SHOULD IMMEDIATELY EXPAND THE BASE OF USF CONTRIBUTORS TO INCLUDE ALL BROADBAND INTERNET ACCESS SERVICES

To ensure broadband deployment to all Americans in a reasonable and timely manner, the Commission must also ensure the sustainability of the High Cost program by expanding the contribution base of the USF. Continued reliance on a shrinking base of interstate and international revenues from voice-grade services predictably results in unsustainable growth in the contribution factor. For example, the Commission recently announced that the contribution factor for the fourth quarter of 2012 will be 17.4 percent, a 1.7 percentage point increase over the third quarter.²² This rise was due in part to a decline in the quarterly contribution base of over \$444 million.²³ In contrast, however, broadband connections continue to grow at a significant pace.²⁴ It is utterly paradoxical to reconfigure the “distribution” side of USF to support broadband while excusing broadband from the “contribution” side of the ledger. Therefore, rather than continue the reliance on a shrinking voice-only contribution base, the Commission should align the contribution mechanism with the goal of ubiquitous broadband availability by including

²²See, *Proposed Third Quarter 2012 Universal Service Contribution Factor*, Public Notice, 27 FCC Rcd 6201 (rel. June 11, 2012); *Proposed Fourth Quarter 2012 Universal Service Contribution Factor*, Public Notice, DA 12-1484 (rel. Sept. 12, 2012), p. 1.

²³ The contribution base for the third quarter of 2012 was \$14.314617 billion, while the base for the fourth quarter of 2012 is \$13.870461 billion. *Id.*

²⁴ See, fn. 4, *supra*. In addition, according to statistics from the Wireline Competition Bureau, between December 2008 and June 2011, Internet access connections over 200 Kbps in at least one direction more than doubled, from 102.2 million to 206.1 million. Industry Analysis and Technical Division, *Internet Access Services: Status as of June 30, 2011*, p. 16, Table 1 (Wireline Competition Bureau, June 2012). OPA/STCO & NTCA comments

broadband Internet access services in the contribution base.²⁵ Furthermore, as the inclusion of broadband Internet access and other services²⁶ in the contribution base will reduce the assessment imposed on each service subject to a contribution requirement, this inclusion will not negatively impact broadband adoption.

Unfortunately, despite the open proceeding on USF contribution reform that is considering, among other things, expansion of the contribution base to include retail broadband Internet access services,²⁷ press reports indicate that this logical update has already been foreclosed.²⁸ The Associations share the disappointment expressed in a subsequent media report by two members of the Federal-State Joint Board on Universal Service (Joint Board).²⁹ The latter article states that John Burke of the Vermont Public Service Board, who also chairs the National Association of Regulatory Utility Commissioners' telecommunications committee, aptly "questioned whether the U.S. ultimately will be able to deliver on a requirement to provide comparable broadband services to those living in urban and rural areas if it doesn't tap into market changes that will lead to an increase in broadband connections and a reduction in numbers-based connections as time goes on."³⁰ And Pennsylvania Public Utility Commissioner James Cawley, who serves as state chair of the Joint Board, claimed to be "disturbed that the

²⁵ See, e.g., reply comments of NTCA, OPASTCO, and WTA, WC Docket No. 06-122, *et. al.* (filed Aug. 6, 2012) (RLEC contribution replies), pp. 3-7.

²⁶ The Commission should also assess for contributions text messaging services, "non-interconnected" voice over Internet protocol (VoIP), and all enterprise communications services with a telecommunications component.

²⁷ *Universal Service Fund Contribution Methodology*, WG Docket No. 06-122, *et. al.*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5389-5392, ¶¶65-72 (2012).

²⁸ See, e.g., Ted Gotsch, *GENACHOWSKI RULES OUT INCLUDING BROADBAND IN REVAMPED USF CONTRIBUTION MECHANISM*, Telecommunications Reports' TR Daily (Sept. 10, 2012).

²⁹ See, Ted Gotsch, *STATE REGULATORS CRITICIZE GENACHOWSKI FOR TAKING BROADBAND CONNECTIONS OFF TABLE*, Telecommunications Reports' TR Daily (Sept. 11, 2012).

³⁰ *Id.*

Chairman seems to have a... closed mind” on such a significant issue, regardless of comments filed by interested parties in the proceeding.³¹

The record bears out the concerns expressed by these members of the Joint Board. While the current contribution base is no longer sustainable, the rapid growth in subscribership to broadband Internet access services is undeniable. Therefore, if all broadband Internet access services were assessed for USF contributions, the Commission could immediately lower the contribution factor, relieving the pass-through amount on every assessed service and establishing a base of contributions that would help to sustain the Fund for the long term. Moreover, assessing all broadband Internet access services will align contribution requirements with the primary purpose of the funding, which is to ensure the universal availability of broadband-capable networks.³²

Also, since expanding the base will lead to a lower contribution factor, a nominal USF assessment will not lead existing broadband subscribers to drop their service or deter potential new customers from subscribing. As the National Association of State Utility Consumer Advocates (NASUCA) observed:

...given the vagaries of broadband pricing and the market move to broadband, the notion that assessing broadband service to pay for supporting broadband (including voice over broadband) will suppress broadband subscription seems almost silly.³³

Furthermore, the opportunity to subscribe to broadband will be greatly enhanced by requiring providers of broadband Internet access to contribute to the Fund.³⁴ This is because a contribution mechanism consisting of a growing revenue base, rather than the

³¹ *Id.*

³² RLEC contribution replies, pp. 18-19.

³³ NASUCA comments, WC Docket No. 06-122, GN Docket No. 09-51 (filed Jul. 9, 2012), p. 7.

³⁴ U.S. Cellular comments, WC Docket No. 06-122, GN Docket No. 09-51 (filed Jul. 9, 2012), p. 25.

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currently eroding one, will ensure that sufficient funding can be made available for the foreseeable future to enable the Commission to meet its broadband deployment goals.³⁵

In fact, AARP, which supports a contribution requirement for broadband Internet access services, states that “the impact on broadband subscription from new broadband availability is likely to be *positive and substantial*.”³⁶

There is no question that it is in the public interest to require providers of all broadband Internet access services to contribute to the USF. These providers will benefit directly from the “network effect” that results from the expansion of broadband networks and subscribership nationwide, which the High-Cost program now explicitly seeks to achieve. Also, inclusion of broadband Internet access services in the contribution base would allow for a meaningful conversation regarding the longer-term funding needed to achieve policymakers’ goals and expectations for universal broadband. Absent a sustainable contribution base, the Commission will be unable to establish a High-Cost program that ensures affordable, high-quality broadband services are deployed to all Americans in a reasonable and timely fashion.

IV. DATA USED TO GENERATE THE NATIONAL BROADBAND MAP SHOULD NOT BE USED TO TARGET CAF FUNDING

The NOI seeks comment on the National Broadband Map (NBM), recognizing that data used to generate the NBM is prone to inaccuracy.³⁷ The NOI acknowledges that this data may tend to misrepresent deployment, for example, because some customers

³⁵ *See, Id.*

³⁶ AARP comments, WC Docket No. 06-122, GN Docket No. 09-51 (filed Jul. 9, 2012), p. V (emphasis added).

³⁷ NOI, ¶31.

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within a census block may not be able to achieve the reported speeds.³⁸ However, this is not the only shortcoming the NBM suffers. It has also been demonstrated that the reporting methodology used to create the NBM leads to cases where an entire census block is shown on the map as “served” by an ILEC, even if only a single location in that census block is able to receive broadband.³⁹ The Associations’ members also report instances where served areas are shown as unserved. Further concerns, as the Associations and other have demonstrated in detail elsewhere, include:

- inconsistencies in the shapes and shading of the maps;
- inaccurate association of census blocks to study areas due to the method in which geographical boundaries are provided;
- errors in the Tele Atlas database utilized to create the map;
- the extension of census block boundaries outside of the Tele Atlas boundary, making it impossible to determine if the data matches;
- the inaccurate display of census areas on the map;
- boundary errors and lack of data granularity that prevent the accurate association of demographic information; and
- software errors that allow differing areas to fall into the same boundary.⁴⁰

Despite attempts at improvements, the NBM remains an incomplete and error prone mechanism. As such, its lack of reliability precludes its usefulness in many situations. At the very least, it should not be used to target CAF funding for RLEC service areas unless and until its various flaws can be satisfactorily addressed.

³⁸ *Id.*

³⁹ *See*, Letter from Genevieve Morelli, President, ITTA, *et. al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et. al.* (filed Mar. 6, 2012).

⁴⁰ Initial comments of NECA, NTCA, OPASTCO and WTA, WC Docket No. 10-90, *et. al.* (filed Jan. 18, 2012), Appendix D, pp. 3-8; *see also*, Letter from Jeffrey Lanning, Assistant Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et. al.* (filed Jan. 27, 2012), Attachment, *Limitations of Connect America Fund Phase I Incremental Support Criteria*, pp. 4-15.

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V. THE COMMISSION CAN ACCELERATE BROADBAND DEPLOYMENT AND UPGRADES IN RLEC SERVICE AREAS BY REMOVING BARRIERS TO RLECS' ACCESS TO VIDEO CONTENT

The NOI notes that removing barriers to investment as called for by Section 706 requires removing obstacles to interrelated factors, notably deployment and adoption.⁴¹ The NOI also observes that the “lack of relevance of broadband for some consumers” is among the barriers that impede the reasonable and timely deployment and adoption of broadband.⁴² Indeed, the Commission’s most recent Broadband Progress Report states that among households that do not subscribe to Internet access services, the reason given most often is a lack of perceived relevance. These households cite lack of relevance more often than other concerns, including price, the lack of broadband availability, or even the lack of a computer.⁴³

However, as consumers are able to obtain video programming – including traditional subscription video services – through broadband connections, the perceived relevance of broadband is significantly enhanced and expanded.⁴⁴ The Commission has long recognized the intrinsic link between a provider’s ability to offer video service and to deploy broadband networks.⁴⁵ This assessment was reinforced last year by state

⁴¹ NOI, ¶54.

⁴² *Id.*, ¶55.

⁴³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report, FCC 12-90 (rel. Aug. 21, 2012), ¶152.

⁴⁴ As the Associations recently reported in the Video Competition docket, provision of video over broadband infrastructure by RLEC multichannel video programming distributors (MVPDs) is growing, while other means these companies use to deliver video, mainly coaxial cable and satellite, are declining. *See*, OPASTCO & NTCA comments, MB Docket No. 12-203 (filed Sept. 10, 2012) (Video competition comments), p. 2.

⁴⁵ MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶62 (2007).

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regulators,⁴⁶ and matches the experience of rural carriers. For example, in a 2009 study, the National Exchange Carriers Association (NECA) found that members of its Traffic Sensitive Pool offering broadband using Digital Subscriber Line (DSL) technology along with a video component had DSL adoption rates nearly 24 percent higher than those companies offering DSL without access to subscription video services.⁴⁷

Therefore, one of the most effective methods available to the Commission to encourage adoption and, by extension, the further deployment of advanced services is to improve rural broadband providers' access to video content. The Associations and others have provided detailed suggestions in MB Dockets 12-203 and 10-71 regarding actions the Commission should take in order to do so. Specifically, the Commission should:

- extend the prohibition on exclusive contracts for satellite delivered programming between cable operators and vertically integrated programmers for an additional five years;
- prohibit programmers from requiring mandatory non-disclosure provisions in contracts that prevent rural MVPDs from gauging the market value of content;
- prohibit programmers from engaging in forced tying, *i.e.*, requiring rural MVPDs to purchase undesired programming in order to gain access to desired content;
- prohibit mandatory broadband tying, where rural MVPDs must pay per-subscriber fees for non-video broadband customers;
- prohibit programmers from requiring rural MVPDs to place content in specific service tiers;
- allow rural MVPDs to obtain content from outside of their designated market area;

⁴⁶ See, *Resolution on Fair and Non-Discriminatory Access to Content*, National Association of Regulatory Utility Commissioners (adopted Feb. 16, 2011), available at <http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf>.

⁴⁷ NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

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- closely monitor the market for “over the top” web-based video services to ensure that exclusive arrangements do not prevent rural MVPDs and broadband providers from gaining access to certain web-based video content; and
- reform the outdated retransmission consent process by strengthening the “good faith” rules by prohibiting stations that are not under common ownership from negotiating or approving one another’s retransmission agreements, among other recommendations provided by the Associations in MB Docket No. 10-71.⁴⁸

Section 706 provides the Commission with ancillary authority to reform video access rules, including those governing retransmission consent.⁴⁹ The Commission, perceiving the linkage between video and broadband services, has used this ancillary authority previously, specifically in the 2007 *Local Franchising Order*,⁵⁰ and later the same year in the *Multiple Dwelling Unit Order*.⁵¹ Notably, these precedents were set when the Commission had determined under Section 706 that broadband deployment was being deployed to all Americans in a reasonable and timely fashion.

Subsequently, as the NOI notes,⁵² the Commission reversed that finding and determined that deployment is not occurring in a reasonable and timely fashion, and that rural communities are disproportionately impacted. In this case, Section 706 *requires* the Commission to “take *immediate action* to accelerate deployment”⁵³ of advanced services by removing barriers to infrastructure investment. Given the established linkage between access to video content and broadband deployment, the suggestions offered above would

⁴⁸ See, comments of OPASTCO, NTCA, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71 (filed May 27, 2011); Video competition comments; *see also*, OPASTCO & NTCA comments, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012).

⁴⁹ The Commission’s primary authority to govern retransmission consent is contained in 47 U.S.C. §325(b)(3)(A).

⁵⁰ MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶62 (2007); *see also* ¶¶ 4, 13, 18, 41, 51-52, 64.

⁵¹ MB Docket No. 07-51, 22 FCC Rcd 20235, 20257-20258, ¶47 (2007); *see also* ¶¶ 46, 52, 78.

⁵² NOI, ¶3.

⁵³ 47 U.S.C. §1302(b) (emphasis added).

help the Commission to fulfill its requirements under the law and should be implemented without delay.

VI. CONCLUSION

To achieve the Congressional objectives contained in Sections 706 and 254, the Commission should:

- provide RLECs with sufficient and predictable high-cost support mechanisms, which are necessary to encourage broadband investment and deployment;
- expand the base of USF contributors to include all broadband Internet access services, among others;
- avoid targeting CAF funding based on the flawed National Broadband Map; and
- remove barriers to RLECs' access to video content through reform of program access rules, notably retransmission consent.

Respectfully submitted,

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